NO. 20754

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD WRAY SPEARS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in all counts of a three-count indictment, following trial by jury [C. T. 25]. 1/

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to

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1/ "C. T." refers to the Clerk's Transcript.

Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in each count of a three-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division. The first count alleged that appellant knowingly imported and brought approximately one ounce of heroin, a narcotic drug, into the United States from Mexico, contrary to Title 21, United States Code, Section 173 [C. T. 2].

The second count alleged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately one ounce of heroin, a narcotic drug, which, as he then and there well knew, had been imported and brought into the United States contrary to law [C. T. 3].

The third count alleged that appellant returned to and entered the United States without registering as required under Title 18, United States Code, Section 1407, being a citizen of the United States who was addicted to narcotic drugs, a user of narcotic drugs, and a person who was convicted of possession of narcotics in 1957 [C. T. 3].

Jury trial of appellant commenced on July 20, 1965, before United States District Judge James M. Carter [C. T. 23]. Appellant was found guilty as charged on each count on July 21, 1965 [C. T. 24-25].

Thereafter, on August 23, 1965, appellant was committed to the custody of the Attorney General for five years upon Count One, five years upon Count Two (to run concurrently) and two years upon Count Three (to run concurrently). There was a recommendation for hospital treatment for narcotics addiction [C. T. 27].

Appellant subsequently filed a notice of appeal [C. T. 29].

III

ERROR SPECIFIED

Appellant has specified only one point upon this appeal:

> "That the heroin found in exhibit 2 has been improperly procured from defendant in violation of his right against unreasonable search and seizure under the Fourth Amendment to the Constitution and in violation of due process of law under the Fifth Amendment to the Constitution." (Appellant's Opening Brief, p. 2).

IV

STATEMENT OF THE FACTS

On March 19, 1965, appellant entered the San Ysidro area of California from Mexico in an automobile [R. T. 4-6, 12]. [2/] He

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2/ "R. T." refers to the Reporter's Transcript of Proceedings.

talked to United States Customs Inspector Herbert Reay, Jr., but declared no merchandise [R. T. 4-5]. Appellant at that time was addicted to the use of heroin and was an American citizen [R. T. 5, 54-55], but he did not register under Title 18, United States Code, Section 1407 [R. T. 9]. He told Inspector Reay that he was from Oakland [R. T. 5].

Inspector Reay observed appellant as the latter removed from his pocket a piece of paper resembling a narcotics or heroin bindle [R. T. 6-7]. Appellant stated that he did not know what was in the paper [R. T. 7]. A test was used upon the bindle without reaching any resulting determination that it contained heroin or a derivative of opium [R. T. 9].

Inspector Reay, who had had 13 years of law enforcement experience at the border, noted that appellant had needle marks similar to those generally found upon narcotics addicts or users [R. T. 8]. He then decided to conduct a body search, involving the removal of all clothing. During this inspection he observed grease around appellant's rectal area [R. T. 7, 11].

Customs Agent Arnie Lohman advised appellant of his Constitutional rights and questioned him. Appellant stated that he had purchased the bindle in Tijuana and that it was supposed to contain cocaine [3/] [R. T. 22, 24].

3/ Cocaine is a narcotic drug.

Erwing v. United States, 296 F. 2d 320 (9th Cir. 1961).

Agent Lohman observed that appellant had fresh needle marks and scar tissue over the veins and that the pupils of his eyes did not react normally. Furthermore, the fact that appellant had grease in his rectal area indicated to Agent Lohman (who had been a Customs agent for 37 years) that narcotics were concealed in a body cavity [R. T. 22-23].

Customs officers transported appellant to the office of Dr. Paul R. Salerno, who examined appellant and declared that appellant was a narcotic user and under the influence of narcotics at that time [R. T. 25, 29]. Agent Lohman then arrested appellant for failing to register as a narcotic user [R. T. 25].

Appellant objected to a rectal examination but submitted under protest after he was informed that the examination would be conducted whether he agreed or disagreed. He kicked his feet during the examination and was restrained by officers [R. T. 25, 27]. Dr. Salerno removed a rubber-enclosed packet from appellant's rectal cavity and gave it to Agent Lohman [R. T. 33].

United States Customs Chemist George Hill later analyzed the contents of the packet. He testified concerning his expert qualifications and also testified that the packet contained about 25 grams of heroin [R. T. 18-21]. Other witnesses testified concerning the possession of the packet and bindle between the time that they were obtained from appellant and the time of Mr. Hill's analysis of each [R. T. 14-15, 23, 26, 33].

Dr. Salerno testified concerning his academic and medical background [R. T. 29-30]. He also testified that he observed five

relatively recent needle marks upon one of appellant's arms, that appellant was then under the influence of a narcotic drug as well as another drug, and that the exhibit in question was removed from appellant's rectum in an approved medical manner, involving use of a sanitary glove [R. T. 31-35].

He testified that the removal of the object would not be very different from a normal bowel movement in terms of physical discomfort, that appellant exhibited no exclamation or evidence of pain, and that the original insertion of the packet would be more painful than the removal [R. T. 34].

After the packet was removed from his rectal cavity, appellant was again advised of his Constitutional rights and stated: "You might as well throw that bindle away. That is only sugar of milk. I brought it along to test narcotics in Mexico." [R. T. 26.] The bindle that had been removed from appellant's pocket at the border did contain milk sugar [R. T. 19].

At the time of the offense appellant was on parole relating to charges of possession and use of drugs [R. T. 53].

The trial Court denied appellant's motion to suppress evidence as untimely [R. T. 42-43]. The Court also announced findings of fact upon the question [R. T. 42, 61-64, 118]. The Court held that the search at Dr. Salerno's office was an extension of a border search, that no physicians of repute were known to reside at San Ysidro, that the search also was incident to a lawful arrest, that the search was reasonable and did not shock the conscience or offend the sense of justice, and that appellant suffered no pain

[R. T. 62-64].

The jurors also answered interrogatories relating to the validity of the search. They were instructed that the answers to the interrogatories must be unanimous [R. T. 104].

The jury held that the digital examination and procedures employed by Dr. Salerno were "performed in the proper and customary approved medical manner". The jurors also held that no pain or suffering was involved. Furthermore, they held that the search of appellant's rectal cavity was not "shocking to the conscience or offensive to a sense of justice" [C. T. 26]. Each of these conclusions was unanimous [R. T. 115].

V

ARGUMENT

A. THE EVIDENCE IN QUESTION WAS LAWFULLY SEIZED.

Appellant asserts that the search of his rectum was unreasonable. Searches of this nature have been repeatedly upheld by this Court.

Blackford v. United States, 247 F.2d 745 (9th Cir. 1957);

Murgia v. United States, 285 F.2d 14 (9th Cir. 1960);

Denton v. United States, 310 F.2d 129 (9th Cir. 1962);

Morgan v. United States, 340 F. 2d 125
(9th Cir. 1965). [4]/

Appellant asks this Court to overrule its decision in Blackford, supra, but he does not cite a single decision supporting his position.

Appellant contends that probable cause should have been determined by a magistrate. However, the search in question was a border search (Denton, supra, at p. 133), and a border search does not require probable cause to arrest or search.

Witt v. United States, 287 F. 2d 389, 391
(9th Cir. 1961), cert. denied,
366 U. S. 950 (1961);

Bible v. United States, 314 F. 2d 106, 108
(9th Cir. 1963).

A border search does not require a warrant.

Denton, supra, at p. 132;

Landau v. United States Attorney for Southern Dist.,
82 F. 2d 285, 286 (2nd Cir. 1936), cert.
denied, 298 U. S. 665 (1936).

"Mere suspicion has been held enough cause for a search at the border."

Witt, supra, at p. 391, quoted with approval in
Bible, supra, at p. 108, and in

4/ As this brief is being prepared, an appeal involving the same issue is pending before this Court in Moises Rivas v. United States, No. 20556.

King v. United States, 348 F. 2d 814, 817 (9th Cir. 1965).

A determination by a magistrate would depend upon probable cause, but the law does not require probable cause. "Mere suspicion" is sufficient. In the instant case there was more than mere suspicion. Appellant was under the influence of narcotics and another drug at the time of the search. He had five relatively recent needle marks upon one arm [R. T. 31-35]. He had grease in his rectal area, which indicated to Agent Lohman (who had been a Customs agent for 37 years) that narcotics were concealed in a body cavity [R. T. 22-23]. His eyes did not react normally, and he admitted having just attempted to purchase cocaine (a narcotic drug) in Tijuana [R. T. 22-24].

Although the law does not provide for such a procedure, appellant had the benefit of a jury decision as well as a decision by the trial judge upon the question of validity of the search. The jurors held that the digital examination and procedures used by Dr. Salerno were "performed in the proper and customary approved medical manner" [C. T. 26]. They found that the defendant did not endure any pain or suffering during the doctor's examination [C. T. 26]. The jury also held that the search of appellant's rectal cavity was not "shocking to the conscience or offensive to a sense of justice" [C. T. 26]. The trial Judge also held that the search was reasonable [R. T. 62-64].

B. THE SEARCH WAS A PROPER SEARCH INCIDENT TO A LAWFUL ARREST.

The jury found that the search of appellant's rectal cavity was preceded by the arrest of appellant [C. T. 26]. Furthermore, the trial Court held that the search was incident to a lawful arrest [R. T. 63]. Consequently, the search not only was a proper border search but also was a proper search incident to a lawful arrest. There is an important public interest in the search of prisoners to prevent the dissemination of narcotics in the jails and prisons.

C. THE MOTION TO SUPPRESS EVIDENCE WAS PROPERLY DENIED AS UNTIMELY.

The motion to suppress evidence herein was denied as untimely [R. T. 42-43]. It is evident from the record that appellant failed to comply with Rule 41(e) of the Federal Rules of Criminal Procedure, which provides in pertinent part as follows:

> "The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

In absence of extenuating circumstances, a motion to suppress evidence is waived if not made in a timely fashion.

Sandez v. United States, 239 F. 2d 239, 242 (9th Cir. 1956);

Segurola v. United States, 275 U. S. 106, 112 (1927).

The fact that evidence is taken upon a motion to suppress evidence does not prevent a proper decision that the motion will be denied as untimely.

United States v. Paradise, 334 F. 2d 748, 749 (3rd Cir. 1964).

D. THE DECISION IN MIRANDA VS. ARIZONA IS NOT RETROACTIVE.

The only case cited by appellant in support of his position is Miranda v. Arizona, 384 U. S. 436 (1966). However, the decision in Miranda does not apply to trials commencing prior to June 13, 1966.

Johnson v. New Jersey, 384 U. S. 719, 734 (1966).

The trial herein commenced on July 20, 1965 [C. T. 23], prior to the Miranda decision.

E. WHETHER OR NOT APPELLANT WAS ADVISED OF HIS CONSTITUTIONAL RIGHTS CANNOT AFFECT THE LEGALITY OF THE SEARCH.

Appellant contends that he should have been advised of his privilege against self-incrimination and his right to counsel. He

was given considerable advice in this regard [C. T. 26]. Such a warning would not have affected the right to search appellant's rectum. Had he desired to invoke the privilege against self-incrimination, he would not have prevented the search. Advice by an attorney also would not have prevented the search.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON